

BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of }
 }
JOSEPHINE LANG }

Appearances:

For Appellant: Donald J. Kennedy, Attorney at Law

For Respondent: Crawford H. Thomas, Associate Tax Counsel

 O P I N I O N

This appeal is made pursuant to Section 18593 of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protest of Josephine Lang to the proposed assessment of additional personal income tax in the amount of \$1,294.38 for the year 1953.

Appellant was employed as a servant in the home of a San Francisco family. Her services began in 1887 and continued until the last of the family Bessie Murphy, died in 1951. For her services she received her board and room and, in addition, the sum of \$30.00 per month from 1887 until 1931, \$50.00 per month thereafter until 1937, and \$20.00 per month thereafter until 1951.

Having promised Appellant that she would be well cared for, Bessie and her sister Jennie, then the sole survivors of the family, attempted in 1927 to make a joint holographic will whereby the family's home and \$100.00 per month were to be given to Appellant for the rest of her life. Jennie died in 1950. Upon the death of Bessie, the will was declared invalid and an administrator was appointed for her estate. Appellant entered a claim for the reasonable value of her past services but it was rejected by the administrator.

Appellant filed a complaint in the Superior Court alleging, among other things, that "for sixty-four years ... plaintiff, at the special instance and request of Bessie W. Murphy, rendered constant service ... in caring for her and administering to her comfort ... with the understanding and agreement ... that she would compensate plaintiff for said services in money and/or property to the amount of the reasonable value of said services upon the termination of said services at or before the death of Bessie W. Murphy." The court found the foregoing allegations to be true and also found that the reasonable value of plaintiff's services for the years in question was in excess of the compensation actually received. Accordingly, plaintiff was awarded a total of \$36,050.00 by a judgment, entered in 1953, which apportioned the amount as follows:

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- "a. For the reasonable value of plaintiff's services in excess of the compensation actually paid, namely, Thirty Dollars (\$30.00) per month for the period from August 1, 1887, to January 1, 1931, 511 months at \$30.00, Fifteen Thousand Three Hundred Thirty Dollars (\$15,330.00);
- b. For the reasonable value of plaintiff's services in excess of the compensation actually paid, namely, Forty Dollars (\$40.00) per month for the period from January 1, 1931, to January 1, 1937, 72 months at \$40.00, Two Thousand Eight Hundred Eighty Dollars (\$2,880.00);
- c. For the reasonable value of plaintiff's services in excess of the compensation actually paid, namely, One Hundred Dollars (\$100.00) per month for the period from January 1, 1937, to November 12, 1951, 178-2/5 months at \$100.00, Seventeen Thousand Eight Hundred Forty Dollars (\$17,840.00);"

In reporting her income for 1953 Appellant submitted schedules referring the different portions of the awarded \$36,050.00 back to the years when, according to the judgment, they should have been received, Thus Appellant treated the awarded sum as "back pay," pursuant to Section 17058 (now 18243) of the Revenue and Taxation Code which provided:

"If the amount of the back pay received or accrued by an individual during the taxable year exceeds 15 per centum of the gross income of the individual for such year, the part of the tax attributable to the inclusion of such back pay in gross income for the taxable year shall not be greater than the aggregate of the increases in the taxes which would have resulted from the inclusion of the respective portions of such back pay in gross income for the taxable years to which such portions are respectively attributable, as determined under regulations prescribed by the Franchise Tax Board."

There is no question as to the applicability of the quoted section to Appellant's receipt of the \$36,050.00 in 1953 if that sum was "back pay" as defined in Section 17059 (now 18244) of the Revenue and Taxation Code. The Franchise Tax Board, however, determined that the sum was not "back pay" as therein defined, and therefore proposed the assessment here on appeal.

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The pertinent code section read as follows:

"17059. For the purposes of Section 17058, 'bank pay' means (A) remuneration, including wages, salaries, retirement pay, and other similar compensation, which is received or accrued during the taxable year by an employee for services performed prior to the taxable year for his employer and which would have been paid prior to the taxable year except for the intervention of one of the following events: (i) bankruptcy or receivership of the employer; (ii) dispute as to the liability of the employer to pay such remuneration, which is determined after the commencement of court proceedings; (iii) if the employer is the United States, a state, a territory, or any political subdivision thereof, or the District of Columbia, or any agency or instrumentality of any of the foregoing, lack of funds appropriated to pay such remuneration; or (iv) any other event determined to be similar in nature under regulations prescribed by the Franchise Tax Board; and (B) wages or salaries which are received or accrued during the taxable year by an employee for services performed prior to the taxable year for his employer and which constitute retroactive wage or salary increases ordered, recommended, or approved by any federal or state agency, and made retroactive to any period prior to the taxable year; and (C) payments which are received or accrued during the taxable year as the result of an alleged violation by an employer of any state or federal law relating to labor standards or practices, and which are determined under regulations prescribed by the Franchise Tax Board to be attributable to a prior taxable year. Amounts not includible in gross income shall not constitute 'back pay.'"

Although both Appellant and the Franchise Tax Board have focused their arguments upon subsection (A)(iv) rather than subsection (B), it nonetheless is clear to us that this latter part of the definition of "back pay" disposes of the matter in issue. Moreover, the regulations adopted by the Franchise Tax Board cover this precise situation by providing that "the term 'back pay' also embraces retroactive wage or salary increases received or accrued in respect of services performed by an employee for his employer in a prior taxable year which have been ordered ... by any Federal or State agency such as, but not limited to, ... United States and state courts" Title 18, California Administrative Code, Sections 17058-17059. Since Appellant received in 1953 retroactive wage increases ordered by the Superior Court, and made retroactive by that court to periods prior to 1953, the action of the Franchise Tax Board must be reversed.

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O R D E R

Pursuant to the views expressed in the Opinion of the Board *on* file in this proceeding, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, pursuant to Section 18595 of the Revenue and Taxation Code, that the action of the Franchise Tax Board on the protest of Josephine Lang to a proposed assessment of additional personal income tax in the amount of \$1,294.38 for the year 1953 be and the same is hereby reversed.

Done at San Francisco, California, this 29th day of December, 1958,
by the State Board of Equalization.

George R. Reilly , Chairman

Robert E. McDavid , Member

Paul R. Leake , Member

J. H. Quinn , Member

Robert C. Kirkwood , Member

ATTEST: Dixwell L. Pierce , Secretary